

Dover Downs, Inc., v. Lee, et al.
C.A. No. K11A-06-003 JTV
May 31, 2012

OPINION

On March 19, 2010, at approximately 1:30 a.m.,¹ Debony Lee was escorted out of the premises of Dover Downs by City of Dover Police Officers. She was perceived by Dover Downs security to have been loitering and noncompliant with a security officer's instructions that she must play a slot machine or other game in the casino or leave. Dover Downs has a large public casino area.

Ms. Lee ("the complainant") filed a complaint with the Human Relations Commission of the State of Delaware on behalf of herself and other young, African-Americans, alleging that Dover Downs discriminated against her in violation of Delaware's Equal Accommodations law, 6 *Del C.* Chapter 45. At the hearing on her complaint, she contended that she was discriminated against on account of her age, that is, being young, and her race, which is African-American. Dover Downs denied that it violated the Equal Accommodations law.

The Human Relations Commission concluded that Dover Downs had violated the Equal Accommodations law as alleged by Ms. Lee. It awarded Ms. Lee \$20,000 as compensation for her embarrassment and humiliation to be paid by Dover Downs. It also assessed a civil penalty of \$5,000.

There are two nightclubs on the Dover Downs premises which are in close proximity to the casino. As is discussed in the summary of the evidence which follows, the removal of Ms. Lee from Dover Downs' premises occurred in the context of large crowds congregating in areas in and near the casino after the two nightclubs

¹ Early Saturday morning, after midnight Friday night.

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close at 1:00 a.m. on Friday and Saturday nights. In addition to the award to Ms. Lee and the civil penalty, the Commission “suggested” that Dover Downs provide diversity training to its security staff; correct any congestion problems created by the design and location of its nightclubs; develop areas where all of its patrons can continue to enjoy their entertainment experience after the clubs close; reconsider the wisdom of putting patrons on the road immediately after supplying them with alcohol to the extent they become intoxicated; and, if an anti-loitering policy directed to its patrons is necessary, establish a reasonable written policy and train its staff accordingly.

Dover Downs then filed this appeal.²

SUMMARY OF THE EVIDENCE

In the hearing before the Commission, there were seven witnesses.

The first witness, Lois Martinez, is Ms. Lee’s mother. She testified that she went with her daughter to Dover Downs on the Thursday night following the March 19, 2010 incident to make a complaint about what happened; that she and her daughter met with a security officer who took her daughter’s information and told them he would pass it onto Mr. Lee Ford; that Ms. Martinez never heard from Lee Ford so she asked for him on another day but never reached him. The security officer whom she spoke to that day took her name and phone number and did not tell her or her daughter that they needed to make a written complaint; that she and her daughter

² The Department of Justice has filed a brief on behalf of the Commission. Ms. Lee has not participated in the appeal.

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went to Dover Downs on Thursday night following March 19, 2010, and she observed a lot of Caucasian people who were loitering, not abiding by the dress code, intoxicated, stumbling around, and cursing, but that no one asked any of the white people to leave; and that she went to the casino often on Sunday through Thursday nights. She admitted that she could not make a comparison as to how much worse the crowd may be in terms of numbers of individuals in the casino area as between Friday and Saturday nights versus Sunday through Thursday nights; and she does not know whether her daughter, Ms. Lee, plays when she is at the casino.

Marvin Mailey testified that he was a sergeant with the City of Dover Police Department; that he was present at Dover Downs on March 19, 2010; that he vaguely remembered seeing Ms. Lee at Dover Downs; that he never saw Ms. Lee doing anything illegal or anything that would require her to be asked to leave; that he didn't recall how many times he saw her at Dover Downs; that the time in question may have been the only time; that Dover Downs security officers requested help; that he saw Ms. Lee with a group of people who were being asked to leave, and thought Ms. Lee was one of them; that Ms. Lee was standing on the game floor but he did not remember where; that he saw that Ms. Lee and senior security officer Will Smith were talking back and forth but he didn't remember the conversation; that he did remember some heated words between Ms. Lee and security officer Smith; and Ms. Lee stepped around security officer Smith to speak to him, Officer Mailey; that he never saw Ms. Lee yell, scream, or use obscenities; that she exhibited no inappropriate conduct toward him because if she had done so she would have been arrested; that he has been a City of Dover police officer for 17 years and supervised

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a shift of patrol officers; that for about a year he had worked extra duty on occasion assisting security at Dover Downs on Friday and Saturday nights when there is a high crowd; that on those nights problems could occur near the slot machines due to congestion in the areas of the two nightclubs when the clubs closed at 1:00 a.m.; that the police officers were called to assist Dover Downs security officers when the security officers were having trouble with a patron who wouldn't comply with their commands; that on Friday nights they were having trouble with people congregating on the gaming floor, loitering, and not playing games; that the congregating usually occurred when the nightclubs closed at 1:00 a.m.; that the situation then became problematic because people were hanging around and not playing games; that it created a situation for people who were playing games in being able to walk back and forth to the machines; that sometimes the police officers walked through with security and asked people to move along; that most of the time if someone was non-compliant with a security officer, the police officers would be called; that he would not observe inappropriate behavior because it occurs before the police officers are called; that non-compliant conduct does not have to be unlawful conduct for the police officers to be called; that after Dover Downs security asked patrons to leave the area, they could be arrested for criminal trespass if they refused to leave even if their behavior was not illegal; that since he assisted Dover Downs security, if they told a patron to leave and he or she refused, he, Officer Mailey, would remove the patron as Dover Downs decided who was a problem and needed to be removed; that he did not escort Ms. Lee out of Dover Downs because of her race; that he responded to assist Dover Downs security officers, and when they respond they typically move along anybody

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who is standing, regardless of whom they are; that he did not remember who called him to the area but when he arrived, security officer Smith and one or two other security officers were present; that he did not conduct an investigation because if Dover Downs asked someone to leave, he, Officer Mailey, made them leave; that typically the police officer will ask the person whether the security officer has asked the person to leave; the police officer then informs the person that the person must leave; that typically the person says he or she wasn't doing anything; that he remembered that Ms. Lee was upset at the time but did not remember her yelling; that she was not disorderly; that the racial makeup of the patrons at Dover Downs varied depending on the disc jockey, band, etc.; that he did not remember seeing many Hispanic people on March 19, 2010; that he saw white people and black people but remembered there were more black people than white people; that after the clubs let out, at around 1:30 a.m., if people are just standing around talking amongst themselves, the officers tell them they need to move on or start playing the games; that officers do the same thing at Loockerman Exchange or W.T. Smithers; that the police officers deal with people of all ages; that he has contacted people as young as 19 and up to 50 years of age; that after the clubs let out, it is typically a younger crowd, between twenties to mid-thirties. When asked whether, when Dover Downs security contacted the police officers to ask someone to leave, it was more of one ethnic group than another, Officer Mailey testified that Caucasians and African-Americans alike had been asked to leave. When asked whether it seemed that a particular group of people, either by age or ethnic background or by color had been asked to leave more than others, he said no, he couldn't say that; that it's just anybody

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who is loitering and hanging around.

Fred Robinson testified that he is a security officer at Dover Downs. When asked for a definition of loitering, he testified that it meant just hanging out somewhere where there were restrictions; that it did not mean that someone was necessarily committing a crime; that Ms. Lee was disruptive and inappropriate on March 19, 2010 while he was trying to clear areas where there were 200 to 300 people; that they were moving all security officers toward the areas where people were not supposed to stand around when they approached Ms. Lee; that Ms. Lee said she was an ex-security officer and that her mother was an important player, an elite player; that she was very rude and didn't comply with their request to move; that Ms. Lee said they weren't supposed to do what they were doing; that Ms. Lee stated that she knew the rules; that Ms. Lee was at the blackjack tables when they first approached her and her friends; that Ms. Lee and her friends then moved; that at one point Ms. Lee said she was going to play, but she never played; that Ms. Lee questioned their authority; that Ms. Lee was in the walkway between the slot machines and the video blackjack machines; that this had been going on for four weeks with her; that he was an African-American himself;³ that they have college kids of all ethnic cultures that come in Dover Downs; that there were elderly people playing the games; that there are fights where elderly people get hurt; that Ms. Lee was part of a group of people asked to leave; that she was not singled out; that Ms.

³ Both security officer Robinson, who initiated Ms. Lee's removal, and Officer Mailey, who escorted her out, are African-Americans.

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Lee was blocking a machine, standing in an area where they had everybody move; that the whole crowd, of which Ms. Lee was a part, was blocking machines. When asked whether he had ever asked a patron who was white to leave because they were standing there, he testified that they had escorted all ethnic cultures to the door; that they have rules on the door at every entrance saying that an officer has the right to ask any person who is disruptive or not cooperating to leave; that he worked the 12:00 a.m. to 8:00 a.m. shift on March 19, 2010 – Friday night into Saturday morning; that he had worked at Dover Downs for a year and a half and never worked with Ms. Lee; that his job as a security officer was to be seen; that he helped the floor managers to help people and identify problems, crimes, criminals, etc.; that he could not arrest or put his hands on anyone; that some of the elderly were glad that they started asking some of the young people to stop clustering up the areas, because they were scared, worried that if they hit a jackpot, someone in the crowd would get their money; that he was trained that if a patron was not playing the machines or was not at the bar, there was a potential loitering problem; that if a patron was not playing one of the machines, he or she could not sit at the machine; that if the casino was not full, security could be more lenient but on Friday and Saturday nights when they were very, very busy, they had to ask people to move along; that they had gang problems, flash crowds, and criminals in the casino and he had to keep an eye on everything; that if he saw a problem, he called it in and got a supervisor, who would call for a police officer before he approached a patron; that Friday and Saturday are the only nights they have ever felt the need to move people away; that if persons appeared to be loitering, the security officers would inform them that they must play or move;

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that when the nightclub played hip hop music, the casino would have 400 to 600 young people in attendance; that he found that people were more likely to comply with requests from the police than from security officers; that he tried to avoid problems by stopping problems such as fights and drunks before the problems occurred; that another complaint from elderly patrons was that waitresses could not get through to serve a drink; that there was a fight in which an elderly patron was injured; that Ms. Lee was with two other African-American friends, and when the security officers asked everyone to move, the two friends moved; that the two friends were not escorted out; that Ms. Lee and her couple of friends were in an area with a group of other people; that both ethnic cultures, white and black, were in the area; that he just did what he was told and that he had never seen anything in writing as to what to do; that he had received training in non-violent techniques as to how to deal with patrons, security and other general things; that the policy of asking people to move started after fights began to break out; that when people were asked to move, it didn't mean that they had to leave, but they had to move from the clustered areas.

Shayla Jerve testified that she was not present in the casino on March 19, 2010 but that she often went to the casino on Friday and Saturday nights; that if she was with a group of friends security has asked her to move along but if she was alone, no one asked her to move; that she was African-American; that she tries to stay away from the area of the nightclubs and where people bet on sports; that they are pretty populated areas, so she tries to stay away from them; that in those areas there is a greater likelihood that a security guard will approach and ask you to move along; that if she is in another area, they don't say anything to her. When asked whether she felt

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the security officers targeted her, she testified that she felt it was because it is usually more crowded in that area than in other places in the casino; that there were more security guards in the crowded area near the nightclubs; that she had seen a large number of blacks being moved along by security officers in the casino but had not seen whites being pushed along; that she had seen a younger crowd of African-Americans, ages 21 to 30, being pushed along on Friday and Saturday nights; that only African-Americans were asked to move along when the clubs closed; that to avoid being pushed around she stays out of those areas or doesn't go on Friday or Saturday night; that she had never seen Ms. Lee being disruptive or inappropriate; that for past two or three years she had gone to the casino on the weekend once or twice a month;

William Smith testified that he was the senior security officer on his shift at Dover Downs for eight months until July 2010; that he worked directly for Lee Ford; that he did not recall the incident with Ms. Lee. When asked whether he had kicked out more white than black people, he testified that he doesn't keep track. He testified that on March 19, 2010 which was a Friday night, patrons would be loitering if they were not engaged at the bar, not with someone who was gambling, not in a restaurant, a sports booking area, or in a gift shop; that in his opinion, a person was loitering at Dover Downs if the person was not engaged in spending money; that he probably ejected all races, all colors, and all ages, whether or not they had a disability; that if it was an official ejection, he filed a written complaint with the casino but if it was an informal ejection, he asked someone to leave and they complied; that on Friday and Saturday nights, Dover Downs security ejected people every other minute it seemed

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like; that he retired from the Air Force military police after 20 years service and that he had always been involved in security; that he was no longer employed with Dover Downs as he resigned in July 2010 and was now a full time student; that during his shift, he was responsible for everything and that no action was ever taken without the knowledge of security supervision; that the nightclubs would fill to fire safety capacity to the point a person wouldn't be let in until a person came out; that at 1:00 a.m. after the nightclubs emptied out, the security officers usually gave everyone 15 minutes to a half an hour to sort out; that they would then start moving through the crowd; that they would ask people who were not playing at a machine to move on for the evening; that he moved people along because of fire hazards and to eliminate hazards and maintain pathways; that other patrons did not want to deal with the crowds coming out of the clubs as the crowds were generally unruly and drunk; that sometimes paying people would just leave because they didn't want to deal with the crowds; that their asking people to move on was standard practice; that there was a different clientele at the casino on Friday and Saturday nights consisting of college students from Delaware State University, which is right across the street, who were 18 to 26 years old and African-American; that after the bars closed, there was no other place for young people to go so they had to leave the premises; that the young people were there to be a nuisance; that the young people were an element that was not suitable for the clientele that were gambling at the slot machines; that they have loiterers at other times than Friday and Saturday nights who were not asked to move on, but that Friday and Saturday nights after the clubs closed was different from other times; that the fact the crowd was predominately African-American had nothing to

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do with the decision on what to do with the problems that were presented once the bars closed; that Saturday night has a larger crowd that is less African-American because of differences in entertainment; that it is a different crowd on Saturday and Friday nights; that he never moved a person based on the person's color, etc.; that the loitering policy is the same all the time, but more leniently enforced at other times; that the crowds on Friday and Saturday nights can be 300 or 400 people, and that the Friday night crowd got all liquored up and then would not listen to security or the Dover Police.

Herman Lee Ford testified that he was the director of security at Dover Downs. He usually worked Monday through Friday from 8:00 a.m. to 5:00 p.m. and had worked at Dover Downs for fifteen years; that he was not present at the casino on the night of March 19, 2010 and had never seen any surveillance tapes concerning Ms. Lee; that he did not know anything about the incident; that his employees told him that she was asked more than once to move along and she refused to do so; that he was not aware that Ms. Lee had made a complaint and was not aware that she had come in with her mother and had tried to contact him; that when the two nightclub bars in the casino opened in the spring of 2009, he immediately realized they had problems on Friday and Saturday nights; that the nightclubs brought in a different and younger crowd; that there was a different crowd on Friday and Saturday nights as they were the only nights when bands or disc jockeys played music geared to young people; that after the nightclubs were established, there were more people hanging around after the clubs closed and he was concerned for the safety of the patrons and employees; that Dover Downs was having problems with fights, which was one factor

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in asking Dover Police to be on hand; that the crowds were both races; that the issues they were having in this particular area of the premises that caused them to have Dover Police assist them with crowd control included that the crowds were so tight that they couldn't get employees, patrons, or anybody else through the area; that the real issue concerning crowd control was due to patrons blocking areas and sitting at game machines but not playing them; that a lot of people sitting at the games were not even facing the games, but were facing the opposite way; that the purpose of enforcement was to clear the aisles and, if persons weren't playing to move them along; that if anyone was blocking hallways or sitting at the slot machines but not playing them on Friday or Saturday night, it was appropriate to ask them to leave; that hiring the Dover Police had improved the situation two hundred percent; that they still have an occasional problem but he no longer received calls on the weekend and the loitering problem had greatly improved; that these crowd control issues occurred on Friday and Saturday nights because of the crowd; that if persons were blocking the aisle ways preventing patrons and employees from getting through, the situation justified escorting a person out if the person was not cooperating; that most of the 3,100 games were full at that time on Friday and Saturday nights; that people were given two or three opportunities to move along; that if they went north, south, east or west, no one cared as long as the persons would move and not block the aisle ways; that Dover Downs written policy includes that security officers observe the surroundings within the casino, report lingerers in the vicinity of playing patrons, pay particular attention to people who are not playing but who are watching people play out of concern for theft; that persons are not always asked to move if they are sitting

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at a slot not playing, if it's slow during the week when there are 1,000 people there and 3,000 games; that nobody gets excited if a person is sitting not playing under those circumstances; that the bars in area have been open for about two years; that after the bars opened, the crowd control problem manifested itself soon; that Dover Downs also realized that it had a different crowd which it had not experienced before; that before there had never been nightclubs in that area; that the crowd was a younger crowd with more persons just hanging around after the bars closed; that it caused concerns for the safety of patrons and employees; that he was the supervisor when Ms. Lee worked security at Dover Downs; that her employment was terminated because she was a loitering problem and left her post; that she was not an employee when the nightclubs opened and therefore she was not trained on the loitering policy that was put into effect after the clubs opened; that all crowds were asked to leave the machine areas if they were not playing the slots; that patrons were given one warning and then the police were asked to escort them out if they did not leave; that asking Ms. Lee to leave was an appropriate exercise of policy because the security officers were asking all crowds that were blocking aisles or crossways near the machines or sitting at a machine not playing to leave; that she was with a group of people, and police were called when she refused a request to move along; that on different nights there are different racial make ups, depending on music; that on certain nights there may have been more predominantly African-Americans than Caucasians and vice versa; and that both African-Americans and Caucasians have been arrested; that there was no other way to solve the crowd problem that occurred when the clubs closed at 1:00 a.m. due to how the clubs were constructed; that when the clubs closed, people

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in the clubs were forced out into narrow areas near the gaming machines and problems developed if they stayed in those areas; that there were at least a couple of hundred people in the nightclubs when they closed; that he had no idea how many people played slot machines between 1:00 a.m. and 3:00 a.m. on Friday and Saturday nights; and that the loitering policy was enforced more leniently sometimes than at other times.

Ms. Lee testified that she had been seeing young African-Americans mistreated and escorted out of the casino for months but that it did not hit home to her until it happened to her; that people were never moved toward other areas of the premises, they were moved outside; that she had been harassed and told to move on when she had been waiting for her car to be delivered to her from valet parking; that on one occasion she got into a heated discussion with Fred Robinson when he told her to move along when she was already outside the casino; that on Friday, March 19, 2010, she arrived at Dover Downs at about 1:30 a.m. with two friends; that she had not been at the nightclub as she arrived after it had closed; that she and two friends who were also African-American were walking down the aisle from the nightclub area; that right before they reached the blackjack tables, she saw Fred Robinson and he started staking his head at her; that she had been at the casino for 15 minutes when she saw Mr. Robinson and he began giving her a hard time; that she stood with her friends who were playing the blackjack machines; that Mr. Robinson said to her, "you do this every weekend" and she had to leave, she loitered every time she came in the casino; that she started to put money into a machine but Mr. Robinson told her she had to go; that she did not get a chance to sit down at a slot machine before Mr. Robinson told

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her to leave; that Robinson repeated that she would have to go; that she responded that he was not the supervisor, how could he tell her to leave; that Officer Mailey and William Smith then arrived; that Robinson then repeated she has to leave, she does this every weekend, she doesn't play the machines, she just stands around; that she said she would play a nearby machine; that he said no, she does this every weekend; that she was getting embarrassed because it was becoming a scene; that she asked to see a manager but was told she would have to come back on Monday because managers weren't there until Monday; that Mr. Smith was red in the face from yelling and screaming at her; that she was a social worker and was concerned about a police problem in a public place; that four police officers escorted her out of the casino that night; that she was humiliated and embarrassed; that she had been going to the casino since she was a child; that the policy of making people move had developed over the last year and it was only directed toward African-Americans; that she tried to stay away from the casino floor especially in the evenings because of the problem; that it had been five or six years since her employment at Dover Downs was terminated; that she had worked at Dover Downs in the lobby shop and transferred to security when the shop was downsized; and that she worked there in 2005 until about January 2006. Ms. Lee identified a photo from a Dover Downs' video surveillance camera dated January 8, 2006 showing her at the valet parking window during her work shift. She testified that she had been instructed to monitor the door which was shown in the photo as being about three feet from where she was standing; that she admitted that even though she was near to the door, she was not supposed to be talking at the valet window; that this was the incident that led to the termination of her employment; that

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she was not a disgruntled ex-employee as her employment at Dover Downs was just a job during college; that she received her college degree in 2006 and her master's degree in 2009; that she had no ill feelings toward Dover Downs because she was fired; that she did not agree with the decision but she really had not cared about the job; that she had grown and changed in the last five or six years and she was not going to accept discrimination; that she was active in the Delaware State University Alumni Association and they have a lot of activities at the casino; that she went back to the casino that Thursday night after the incident to make her complaint; that she noticed that there were more young white people there that night; that the casino was very busy and people were standing around but no one was escorted out; that she was insulted that Lee Ford never returned her mother's phone calls or responded to the complaint; that she felt sad about the incident; that she had been harassed about loitering for about a year and she had never seen white people being escorted out of Dover Downs; that during the past year, she visited Dover Downs about three weekends a month; that between 1:00 a.m. and 3:00 a.m. on weekend nights, not all of the slot machines were being used; that on the night she was escorted out, there were some friends we were trying to meet up with; that she didn't know what she was necessarily going to do, she didn't play much, but sometimes every now and then would put some money in a machine, they have eating areas where you can eat like at the deli and stuff, and just to hang out with her friends; that on Friday and Saturday nights the majority of the patrons are African-American; that she has never seen white people escorted out of Dover Downs; and that even though there was a pattern of harassment, she kept going back to Dover Downs because there was no

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other place to go to at night in Dover.

The Respondent submitted into evidence the following exhibits:

1. Dover Downs' answer to question number 19 of the questionnaire from the Commission which stated that:

Security Officers at Dover Downs are required to monitor the Dover Downs facility for individuals who linger near playing patrons, but do not play the slots or table games themselves. See Ex. C., Section 5, Dover Downs, Inc. Security Procedure Manual. The purpose of this monitoring is not only to proactively prevent patrons from being crime victims, but also to protect the physical safety of patrons who might be obstructed from moving throughout the establishment by loitering individuals who are blocking the aisles and exits in the building.

2. Ex. C., Section 5, Dover Downs, Inc. Security Procedure Manual entitled "Proactive Crime Prevention" instructed security team members:

. . . to protect not only the Casino, but also our patrons and our co-workers from criminal activity. They are told to observe the surroundings within the Casino. Report all suspicious individuals or groups of individuals who are lingering in the vicinity of playing patrons. Pay particular attention to individuals who do not play the slots or table games themselves, but appear to monitor the play of others.

3. A copy of the Rule posted at Dover Downs which stated that:

For the safety, security and benefit of all our patrons, we may remove any person that we determine has been unruly or disruptive, has engaged in or is suspected of misconduct, has violated or attempted to circumvent club membership

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or casino rules, or has failed to cooperate with security or other casino staff.

STANDARD OF REVIEW

This Court's role in reviewing a decision of the Commission is limited to determining whether the Commission's decision is supported by substantial evidence and is free from legal error.⁴ "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵ In its appellate role, "[t]his Court does not weigh the evidence, determine questions of credibility, or make its own factual findings. It merely determines if the evidence is legally adequate to support the agency's factual findings."⁶ If those findings are not supported by substantial evidence, "or are not the product of an orderly and logical deductive process, then the decision under review cannot stand."⁷

DISCUSSION

The relevant statute, 6 *Del. C.* § 4504(a), provides as follows:

No person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, shall directly or indirectly refuse,

⁴ *Quaker Hill Place v. State Human Relations Comm'n*, 498 A.2d 175, 178 (Del. Super. 1985) (citing 29 *Del. C.* §§ 10142, 10161(5)).

⁵ *Domino's Pizza v. Marian Harris and the Human Relations Comm'n*, 2000 WL 1211151, at *6 (Del. Super. 2000).

⁶ *Id.*

⁷ *Quaker Hill Place*, 498 A.2d at 179 (citing *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985)).

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withhold from or deny to any person, on account of race, age, marital status, creed, color, sex, handicap or national origin, any of the accommodations, facilities, advantages or privileges thereof.⁸

The purpose of Delaware’s Equal Accommodation Law is “to prevent . . . practices of discrimination against any person because of race, age, marital status, creed, color, sex, handicap or national origin.”⁹ The statute “shall be liberally construed to the end that the rights herein provided for all people, without regard to race, age, marital status, creed, color, sex, handicap or national origin, may be effectively safeguarded.”¹⁰ As 6 *Del. C.* § 4501 explains, this Court may look to similar federal and state statutes for guidance in defining the scope of § 4504.¹¹ In doing so, this Court recognizes that the ultimate purpose of public accommodation laws is to remove “the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public.”¹²

Dover Downs is a “place of public accommodation,” which is defined as “any establishment which caters to or offers goods or services or facilities to, or solicits

⁸ § 4504(a).

⁹ 6 *Del. C.* § 4501.

¹⁰ *Id.*

¹¹ “[I]n defining the scope or extent of any duty imposed by [§ 4504] . . . applicable federal, state, or local enactments may be considered.” § 4501.

¹² *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969) (quoting H.R.Rep. No. 914, 88th Cong., 1st Sess., 18).

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patronage from, the general public.”¹³

The *McDonnell Douglas* three part test

In deciding cases alleging unlawful discrimination, Delaware Courts apply a three-part burden-shifting analysis articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*.¹⁴ To prove the allegation:

- (1) the plaintiff must set forth a *prima facie* case of discrimination;
- (2) once the *prima facie* case is established, the burden shifts to the defendant to produce evidence of a legitimate, non-discriminatory reason for denying plaintiff access; and
- (3) if the defendant meets that burden, the plaintiff must carry the burden of proving, by a preponderance of the evidence, that the defendant’s proffered reason was a pretext for discrimination.¹⁵

The first part of the *McDonnell Douglas* test

The first part of the *McDonnell Douglas* test, establishing a *prima facie* case, is itself a three-element test. A plaintiff establishes a *prima facie* case by showing that:

- (1) he is a member of a protected class;

¹³ 6 *Del. C.* § 4502(1).

¹⁴ 411 U.S. 792 (1973).

¹⁵ *Thompson v. Dover Downs, Inc.*, 887 A.2d 458, 461 (Del. 2005) (citing *McDonnell Douglas*, 411 U.S. at 802-803).

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(2) he was denied access to a public accommodation; and

(3) non-members of the protected class were treated more favorably.¹⁶

**Element one of the *prima facie* case:
member of a protected class**

Both parties agree that the appellee is a member of one protected class, African-Americans. Therefore, this element is satisfied as to at least one protected class. There was a dispute as to whether being “young” is a protected class based on age. As discussed below, I find it unnecessary to resolve the issue as to whether being “young” is a protected age class.

**Element two of the *prima facie* case:
denied access to a public accommodation**

Both parties agree that this element is satisfied since the appellee was removed from the premises.

**Element three of the *prima facie* case:
non-members of the protected class were treated more favorably**

As mentioned, the third element of a *prima facie* case is that non-members of the protected class were treated more favorably.¹⁷ The standard for establishment of element three was set forth in *Hadfield’s Seaford v. Rouser*¹⁸ as follows:

¹⁶ *Uncle Willie’s Deli v. Whittington*, 1998 WL 960709, at *4 (Del. Super. Dec. 31, 1998).

¹⁷ *Id.*

¹⁸ 2001 WL 1456795 (Del. Super. Aug. 17, 2001), *aff’d*, 2002 WL 384415 (Del. 2002).

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In order to alleviate the difficulty of establishing disparate levels of service, the *Callwood* court restated the third [element] as:

(3) they did not enjoy the privileges and benefits of the contracted for experience under factual circumstances which rationally support an inference of unlawful discrimination in that (a) they were deprived of services while similarly situated persons outside the protected class were not deprived of those services, and/or (b) they received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable.¹⁹

Factors relevant to determining whether behavior is “markedly hostile” include “whether the conduct is so (1) profoundly contrary to the manifest financial interests of the merchant and/or her employees; (2) far outside of widely-accepted business norms; and (3) arbitrary on its face, that the conduct supports a rational inference of discrimination.”²⁰

The Commission’s findings and conclusions on this element are set forth in full as follows:

5. In the present case, Ms. Lee established a *prima facie* case of discrimination based on her race and age in that:

¹⁹ *Id.* at *5 (quoting *Callwood v. Dave & Busters, Inc.*, 98 F. Supp. 2d 694, 707 (D. Md. 2000)).

²⁰ *Callwood*, 98 F. Supp. 2d at 708.

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a. she proved and Dover Downs did not dispute that she is a young African-American and therefore a member of two protected classes;

b. she proved and Dover Downs admitted that she was denied access to public accommodations;

c. she proved that nonmembers of her protected classes, that is non-African Americans and older people, were treated more favorably by Dover Downs. Ms. Lee's proof as to this issue included her testimony that she frequented Dover Downs' casino on numerous occasions over the years and over the last year had seen young African-American patrons harassed, told to move along, and escorted out of the building. Ms. Lee testified that she had never seen any white person treated in the same manner.

Ms. Lee's mother, Lois Martinez, testified that she had seen the casino crowded with young, white people on Thursday nights who were not playing the machines but were not asked to leave or escorted out.

Ms. Shayla Jervey testified that about twice a month for the last two to three years, she had gone to the casino on Friday and Saturday nights. Ms. Jervey testified she had seen a large number of blacks being moved along in the casino but had not seen whites being pushed along. She had seen a younger crowd of African-Americans, ages 21 to 30 being pushed along on Friday and Saturday

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nights. Ms. Jervey testified that only African-Americans were asked to move along with the clubs closed.

As an initial matter, the parties disagree on what does and does not constitute findings of fact by the Commission. The Commission's decision includes a "Summary of the Evidence" consisting of 11 pages and a separate "Findings of Fact and Conclusions of Law" consisting of a little over 5 pages. Dover Downs contends that the Commission's findings of fact consist of only those facts found in the "Findings of Fact and Conclusions of Law." In the Commission's answering brief, it contends that the "Summary of the Evidence" is also factual findings. I am satisfied that the Findings of Fact and Conclusions of law sets forth the essential facts upon which the Commission rested its findings and that the Summary of Evidence sets forth attendant facts and circumstances.

Turning to the substantive issue, it is apparent that the Commission concluded that Ms. Lee was deprived of services while similarly situated persons outside the protected class of which she was a part were not deprived of those services. The Commission did not perform a "markedly hostile" analysis.

As to age, Dover Downs contends that "young" and "age" are not the same; that Ms. Lee's age is not in the record; that "young" is left undefined both in the Equal Accommodations Law and by the Commission; that the protected class is, therefore, undefined and vague; that state and federal statutes in other contexts define "age" as 40 years of age or more; that Dover Downs is required to discriminate on account of age to the extent that persons less than 21 years of age are not permitted

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in the casino area or in the serving of alcoholic beverages; and that the complainant failed to establish a protected class based on age.

As to race discrimination, Dover Downs contends that the sole basis for the Commission's finding of race discrimination is the testimony of Ms. Lee and Ms. Jervey that on "sporadic" occasions they had seen crowds of African-Americans being moved along, and on occasion escorted out of the building, but had never personally observed a white person treated in the same manner; that such evidence is insufficient to support a finding of race discrimination; that the Commission ignored the "unrefuted" testimony of security officer Robinson, security supervisor Smith, and officer Mailey that at 1:30 on Friday and Saturday nights they prompted groups of people regardless of age to play the slot machines or move elsewhere; that they had personally escorted whites, African-Americans, and individuals of all races and ages (and persons as old as 50 years of age) out of Dover Downs under the crowd control policy when such persons were non-compliant; and that regardless of what Ms. Lee and Ms. Jervey think they observed on the few occasions that they were at Dover Downs, the overwhelming evidence was that the policy was applied equally to all loiters in the area outside the bars.

The Commission contends that Dover Downs never disputed Ms. Lee's testimony that she was a young person; that Dover Downs is precluded from raising that issue for the first time on appeal; that Ms. Lee's appearance, such facts as her college degree dates and other evidence clearly established that she was a young person; that the Commission's decision is supported by the testimony of Ms. Lee that she had seen young, African-American patrons harassed, mistreated, told to move

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along, and escorted out of the building; security officer Robinson's testimony that there were elderly people playing the machines and that college kids and locals were loitering in the area where the machines were; Ms. Jervey's testimony that she had seen a younger crowd of African-Americans, ages 21 to 30, being pushed along on Friday and Saturday nights; Mr. Smith's testimony that there was a different clientele at the casino on Friday and Saturday nights consisting of college students from Delaware State University who were 18 to 26 years old; his testimony that other patrons did not want to deal with the crowds coming out of the clubs as the crowds were generally unruly and drunk; his testimony that after the bars closed, there was no other place for young people to go so they had to leave the premises; his testimony that the young people were a nuisance; his testimony that the young people were an element that was not suitable for the clientele that were gambling on the machines; Mr. Ford's testimony that when the two nightclub bars in the casino opened in the spring of 2009, he immediately realized they had problems on Friday and Saturday nights; his testimony that the nightclubs brought in a different and younger crowd; his testimony that there was a different crowd on Friday and Saturday nights as they were the only nights when bands or disc jockeys played music geared to young people; his testimony that after the nightclubs were established, there were more people hanging around after the nightclubs closed; and Ms. Martinez's testimony that she had seen the casino crowded with young, white people on Thursday nights who were not playing the machines but were not asked to leave or escorted out.

In its findings in paragraph 5 of its decision, set forth above, the Board appears to have seized on the testimony of Ms. Lee, Ms. Martinez and Ms. Jervey to the

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exclusion of the testimony of security officer Robinson, security supervisor Smith, Officer Mailey, and director of security Ford. No comment is made concerning the testimony of security officer Robinson, security supervisor Smith, Officer Mailey, or director of security Ford. Whether and to what extent the Commission duly considered their testimony is unclear. The testimony of Ms. Lee, Ms. Martinez, Ms. Jervej, security officer Robinson, security supervisor Smith, and Officer Mailey is not necessarily irreconcilable. If this third element of a *prima facie* case was the sole decisive issue, I would be inclined to remand the case to the Commission for more complete findings of fact. However, since I find that the Commission committed error regarding the third element of the *McDonnell Douglas* test as discussed below, I find that further consideration of this issue is unnecessary.

The second part of the *McDonnell Douglas* test

The Commission concluded that Dover Downs did present evidence of a legitimate, non-discriminatory reason for denying Ms. Lee access to its facilities. The Board found, in part, on that point as follows:

6. Dover Downs presented evidence of a legitimate, non-discriminatory reason for denying Ms. Lee access to its facilities. The reason presented was that its anti-loitering policy was used to facilitate the movement and departure of a large number of youth who loitered in the casino after the nightclubs closed making it difficult for paying customers and casino players to move through the facility and enjoy their entertainment experience at Dover Downs.

According to Dover Downs, its security officers

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were required to monitor the casino for individuals who lingered near playing patrons, but did not play the slots or table games themselves. The purpose of this monitoring was to proactively prevent patrons from being crime victims and to protect the physical safety of patrons who might be obstructed from moving throughout the establishment by loitering individuals who were blocking the aisles and exits in the building.

Dover Downs' Security Procedure Manual instructed security team members to protect the casino, casino patrons and co-employees by observing the surroundings and reporting all suspicious individuals or groups of individuals who were lingering in the vicinity of playing patrons. Dover Downs' posted rule stated that for the safety, security and benefit of all its patrons, Dover Downs could remove any person it determined was unruly or disruptive, had engaged in or was suspected of misconduct, or had failed to cooperate with security or other casino staff.

Since the Commission found for the appellant on this issue, further discussion on the second part of the *McDonnell Douglas* test is not needed.

The third part of the McDonnell Douglas test

Under the third part of the *McDonnell Douglas* test, once the Respondent establishes a legitimate, non-discriminatory reason for its conduct, the burden shifts to the complainant to prove by a preponderance of the evidence that Dover Downs'

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proffered reason was a pretext for discrimination.²¹ On this element of the *McConnell Douglas* test, the Commission made the following findings:

7. Ms. Lee showed by a preponderance of the evidence that Dover Downs' proffered reason was merely pretextual through the following witnesses:

a. Fred Robinson, a security officer employed by Dover Downs testified that when the nightclubs played hip hop music, hundreds of young people patronized the clubs located within the casino. Mr. Robinson testified that on March 19, 2012, there were elderly people playing the slot machines and that there were college kids and locals loitering in the area where the machines were. Mr. Robinson testified that he just did what he was told to do, move people out of the casino when the nightclubs closed - and that he had never seen anything in writing as to what to do concerning the loitering policy.

b. William Smith who was a security supervisor for Dover Downs from December 2009 through July 2010, testified that there was a different clientele at the casino on Friday and Saturday nights consisting of college students from Delaware State University who were 18 to 26 years old and were African-Americans. Mr. Smith testified that he moved people along because other patrons who had not been in the nightclubs did not

²¹ *Stewart v. Human Relations Comm'n*, 2010 WL 2653453, at *3 (Del. Super. July 6, 2010).

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want to deal with the crowds coming out of the clubs as the crowds were generally unruly and drunk. Mr. Smith testified that after the clubs closed, there was no other place for people to go so they had to leave. Mr. Smith testified that the young people were there to be a nuisance and that the young people were an element that was not suitable for the clientele that were gambling at the slot machines. Mr. Smith testified that the Friday night crowd was predominately black, that they got all liquored up, and that they did not listen to security or the Dover police.

c. Mr. Herman Lee Ford testified that the two nightclubs in the casino opened in the Spring of 2009. He immediately realized they had problems on Friday and Saturday nights as the clubs brought in a different and younger crowd who hung around after the clubs closed and he was concerned for the safety of the patrons and employees. However, Mr. Ford testified that he had no idea how many people are playing slot machines between 1 am and 3 am on Friday and Saturday nights after the clubs closed. Mr. Ford testified that due to the way the nightclubs were constructed, people leaving the clubs were forced out into narrow areas near the gaming machines. Mr. Ford testified that after the clubs closed, the young people had to leave the casino as there was no other place they could go to in the casino or hotel.

8. The Panel finds that based on the evidence presented at the hearing, Ms. Lee proved by a preponderance of the

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evidence that Dover Downs discriminated against her based on her race and age in denying her access to Dover Downs' facilities and that the reason offered by Dover Downs was a mere pretext.

In order “[t]o raise an inference of pretext in the face of the [defendant’s] legitimate, nondiscriminatory explanation, the plaintiff must undermine the [defendant’s] credibility to the point that a reasonable jury could not find in its favor.”²² Stated differently, the plaintiff must present evidence sufficient “that a jury could find that the [defendant] lacks all credibility.”²³ The complaining witness must offer “specific and significantly probative evidence that the defendant’s alleged purpose is a pretext for discrimination.”²⁴ A plaintiff’s mere subjective personal judgment, belief, or assumption that the defendant’s proffered legitimate, non-discriminatory reason is pretextual is insufficient to establish pretext under the *McDonnell Douglas* burden-shifting analysis.²⁵

In this case, the Commission’s conclusion in paragraph 8 of its decision that Ms. Lee met her burden under the third part of the *McDonnell Douglas* test is conclusory and unexplained. It does not contain an analysis as to how the

²² *Boggerty v. Stewart*, 13 A.3d 542, 553 (Del. 2011) (quoting *Jaramillo v. Colo. Jud. Dept.*, 427 F.3d 1303, 1310 (10th Cir. 2005)).

²³ *Boggerty*, 13 A.3d at 553 (quoting *Jaramillo*, 427 F.3d at 1310).

²⁴ *Boggerty*, 13 A.3d at 554 (quoting *Schuler v. Chronicle Broadcasting Co., Inc.*, 793 F.2d 1010, 1011 (9th Cir. 1986)).

²⁵ *Boggerty*, 13 A.3d at 554.

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Commission reached its decision based upon the facts it recites, and the rationale under which the recited facts lead to that conclusion is left entirely unclear.

Under the third part of the *McDonnell Douglas* test the complainant must go beyond the establishment of a *prima facie* case and present evidence which undermines the credibility of the respondent's legitimate, nondiscriminatory policy.²⁶ The facts set forth in paragraph 7 of the Commission's decision do not appear to have any probative force beyond such relevance as they may have had in parts one and two of the *McDonnell Douglas* test. They do not lead to a conclusion that Dover Downs' legitimate, non-discriminatory anti-loitering policy was a pretext for race or age discrimination, and they do not undermine Dover Downs' stated purpose of protecting its paying customers' security and protecting them from interference by large congregations of loiterers. They do not show any discriminatory motive on the part of Dover Downs. Dover Downs presented substantial evidence of the legitimate, nondiscriminatory reason for its policy. I find that the complainant failed to meet her burden of proving that Dover Downs' legitimate, nondiscriminatory policy was a pretext for discrimination.

What emerges from the evidence in this case is that in the weekends leading up to March 19, Ms. Lee had contact with Dover Downs security officer Robinson which created a perception in his mind that she was a chronic loiterer who did not play the games. Her own testimony supports the conclusion that security officer Robinson had such a perception. Her own testimony also shows that on the night in

²⁶ *Id.* (quoting *Schuler*, 793 F.2d at 1011).

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question she went there after the nightclubs closed not necessarily knowing what she was going to do. Substantial evidence leads to the conclusion that she was escorted out of Dover Downs on March 19 because of the perception that she was a chronic loiterer, did not play the games, and was non-compliant with security officers' instructions. There is no substantial evidence to support the conclusion that the anti-loitering policy was used as a pretext to escort her out of the premises because of her age or race.

Therefore, the decision of the Commission is ***reversed***.

IT IS SO ORDERED.

President Judge

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